ing the case from the jury, by the instruction given on its own motion. It was in the nature of a demurrer to the evidence predicated on all the facts detailed in evidence before the jury on both sides. If a plaintiff makes out a case upon which he can go to the jury, the court has no right after the defence is in to assume it to be true, and require the jury to find for the defendant, or, which is the same thing, to declare that upon the whole case the plaintiff is not entitled to recover. Assuming, however, that the court's instruction was based alone upon the plaintiff's case, it was not proper thus to take the case from the jury. The facts given in evidence by the plaintiff, if true, it seems to me made out a *primâ facie* case, and the jury ought to have been suffered to pass upon them.

Judgment reversed and cause remanded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF KANSAS.[1]

SUPREME COURT OF MARYLAND.[2]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF NEW YORK.[5]

AGENT.

Evidence of Agency—Province of the Court and Jury as to a Question of Agency.—The declarations of a broker or of an agent are not *per se* evidence of agency; but when evidence of facts tending to show that the relation of principal and agent existed, has been offered directly or circumstantially, it is then the province of the jury to determine whether there is such proof of agency as to make the declarations of the supposed agent binding on the principal: *National Mechanics' Bank* v. *National Bank of Baltimore*, 36 Md.

The declarations of an agent are not admissible to bind the principal until the agency is established; but where there is evidence of agency, although not full and satisfactory, such evidence should be submitted to the jury who are the exclusive judges of its weight: *Id.*

It is not the province of the court to determine the question of agency

[1] From W. C. Webb, Esq., Reporter; to appear in 10 Kansas Rep.

[2] From J. S. Stockett, Esq., Reporter; to appear in 36 Md. Rep.

[3] From the Judges; to appear in 51 N. H. Rep.

[4] From C. E. Green, Esq., Reporter; to appear in vol. 8 of his reports.

[5] From Hon. O. L. Barbour, Reporter; to appear in vol. 36 of his reports.

vel non; but to decide whether there is any evidence tending to prove agency: *Id.*

AMENDMENT.

In furtherance of Justice.—Where a party had obtained, through legal proceedings, an unjust advantage, and in these proceedings, has made a mistake, be it ever so trivial, the law will not tolerate an amendment to secure him in his advantage: *Foreman* v. *Scott*, 10 Kans.

When it is in furtherance of justice, the law looks tolerantly on mistakes, and seeks to uphold whatever is honestly attempted to be done: *Id.*

Where a defendant has not been regularly served by summons or publication of notice, the record cannot be amended after judgment so as to bring him into court and sustain the judgment: *Id.*

But where a defendant has been regularly served, and there is simply a defect in the return of the officer, or the proof of publication, that defect can be cured by amendment, so as to conform to the facts: *Id.*

AUCTION. See *Frauds, Statute of.*

BAILMENT.

Commodatum.—A. loaned a sulky and harness, the former the property of his father, to B., to drive and exercise his horse over the track of the Fair grounds of an Agricultural Society. Whilst so driving, the horse ran away and broke, and greatly injured or destroyed the articles loaned. *Held*, that the lender, though not the owner of the sulky, could maintain an action against the borrower to recover its value, and such recovery could be pleaded in bar by him in a subsequent suit by the owner: *Casey* v. *Suter*, 36 Md.

BANKRUPTCY.

Assignee in Bankruptcy—Construction of the Bankruptcy Act.—A judgment for $103.78, &c., was recovered by a bankrupt prior to his becoming such, on the 8th of July 1867. The suit in which the judgment was recovered, was commenced on the 18th of September, 1861, on a promissory note, dated 2d of April 1861, for $153.78. Afterwards, by order of the court, passed on the 22d of April 1870, the original judgment was amended and entered for the sum of $153.78, &c. The conveyance of the property of the bankrupt to his assignee, was made on the 15th of June 1869. In a suit by the assignee of the bankrupt to recover on this judgment, his right to maintain the action was denied upon the ground that the judgment being subsequent in date to the assignment, was not conveyed thereby, but was the property of the bankrupt. *Held*:

1st. That the cause of action and the original judgment thereon, being antecedent to the application in bankruptcy, and to the assignment, passed by operation of law to the assignee, subject to the right of the bankrupt to have the judgment altered and corrected.

2d. That the subsequent action of the court, increasing the amount of the judgment, did not in any manner impair the right or obligation of the assignee to sue for and recover the amount as finally ascertained: *Zantzinger* v. *Ribble, Assignee*, 36 Md.

The provision of the Act of Congress, establishing a uniform system of bankruptcy, which prescribes that as soon as the assignee is appointed

and qualified, the judge or register shall by an instrument *under his hand*, assign and convey to such assignee all the estate, real and personal, of the bankrupt, is merely directory, and the signature of the judge is not essential to the assignment, where some equally formal mode has been adopted, sanctioned by the seal of the court, which imports verity, and gives authenticity to all the judicial acts of the judge: *Id.*

The right of an assignee of a bankrupt to sue for and recover a debt due the bankrupt prior to his bankruptcy, does not depend upon the instrument of assignment prescribed by the bankrupt act; such right is vested in him in virtue of the adjudication of bankruptcy, and his appointment as assignee: *Id.*

An instrument of writing purporting to assign under the Act of Congress, establishing a uniform system of bankruptcy, all the property of a bankrupt to the assignee therein named, certified by the clerk of the District Court of the United States, for the District of Virginia, under the seal of his court to be a true copy of the original assignment on file in his office, is admissible in evidence, and sufficient to show the assignee's right to sue in behalf of the bankrupt's estate: *Id*

Common Carrier.

Contract to carry beyond Carrier's own Route—Conflict of Laws.—The defendants, who were common carriers between P. and B., carried from P. to B. a parcel directed to R., a place beyond their route, and delivered it to the next carrier according to the usage of the business, and the parcel was lost beyond B. The judge who tried the facts did not find an undertaking of the defendants for carriage beyond B., and thereupon gave a general verdict for the defendants. *Held*, that there was no ground for setting aside the verdict: *Gray* v. *Jackson*, 51 N. H.

When a contract is made by a common carrier in one state to transport goods from that state into another, and the goods are lost, the rights of the parties are governed by the law of the state in which the loss happens: *Id.*

Conflict of Laws. See *Common Carrier.*

Constable.

Action by.—A constable has such an interest in property upon which he has levied by virtue of executions, as will enable him to maintain an action to recover the possession thereof from one who has purchased the same of the defendant in the executions, after levy: *Rue* v. *Perry*, 63 Barb.

Void Process.—The rule justifying an officer in the seizure of property under executions good on their face, but really void as to the party, for want of jurisdiction, is intended to be a rule of protection merely: *Id.*

Although an officer may *defend* under such process, he cannot build up a title upon it so as to maintain actions against third persons: *Id.*

Constitutional Law.

Power of Legislature to bind its Successors—Action—Right to contest an Election not a vested Right—Evidence in contested Elections.—The ordinary effect of a repeal of a statute is to put an end to all proceed-

ings under it, pending and undetermined: *Gilliland et al.* v. *Schuyler et al.*, 10 Kans.

In matters of pure legislation, and where nothing results in the nature of contract or vested rights, no one legislature can bind another: *Id.*

The right to contest an election is not a vested right. Given by one legislature it may be taken away by another: *Id.*

Chapter 104 of the General Statutes has a prospective application, and until repealed prescribes the rules for determining the effect and construction of the statutes of each legislature: *Id.*

The repeal by the legislature of 1871 of the Act of 1869, for contesting an election for the location or relocation of county seats, did not put an end to proceedings in contests then pending under said act: *Id.*

On the trial of a contested county-seat election, a witness cannot be allowed to state what other persons not parties to the record told him subsequent to the election, as to the number of times and the names under which they claimed to have voted: *Id.*

Where testimony is erroneously received, which may have influenced the court or jury in the findings or verdict, the error cannot be considered immaterial: *Id.*

Mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the election: *Id.*

Unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely: *Id.*

An election is valid, though there be but two judges appointed or acting: *Id.*

That one of the judges was not present at the polls when elected, and that the clerks were not appointed by the judges, will not vitiate the election when the judges recognised the clerks as properly acting, and both judges and clerks acted during the election, receiving the ballots, counting the votes and making the returns, without any question by any one as to their authority. They were at least officers *de facto*, and their acts as such officers cannot be questioned collaterally: *Id.*

Evidence of a preparation, and an opportunity for and an inclination to wrongdoing, are not of themselves sufficient to sustain a finding of such wrongdoing: *Id.*

Sections 10, 18 and 64, of the Election Law (Gen. Stat., pp. 406, 408 and 420), are directory in their provisions, and a disregard of them will not necessarily vitiate an election: *Id*

Election officers who wilfully neglect or corruptly act in the discharge of any duty under the election laws are liable to prosecution and punishment for misdemeanor: *Id.*

CORPORATION. See *Statutes.*

COSTS.

Non-resident—Endorser of the Writ.—An endorser of the writ of a non-resident is not released by the plaintiff becoming a resident of the state: *Heywood* v. *Benton*, 51 N. H.

A return upon a writ of execution of *non est inventus*, or not satisfied, procured by a defendant in bad faith, and with a fraudulent purpose of

fixing the endorser, is not such a return as the law contemplates, in order to fix the endorser: *Id.*

So long as good faith is observed, the defendant is not bound to active diligence in collecting his costs of the original plaintiff. Nor is he bound to take out execution against the body; nor is he necessarily required to deliver it to the officer in season to make sale of an equity of redemption in real estate: *Id.*

COVENANT.

Running with Land—Warranty—Damages.—Covenants for title run with the land, enure to the protection of the owner for the time being of the estate which they are intended to assure, and they may be enforced not only by the covenantee and his representatives, but by his heirs, devisees and alienees: *Crisfield* v. *Storr,* 36 Md.

In actions on covenant of warranty it is necessary to prove that the eviction of the plaintiff was had under a title paramount, and existing at the date of the covenant, and the *narr.* must so allege, and if it fail to do so, it will be held bad on demurrer: *Id.*

In an action of covenant for title by the assignee of the covenantee, the measure of damages is the consideration which the assignee paid to his immediate grantor, with interest from the date of the eviction, and costs in the ejectment suit; with the limitation, however, that the amount recovered cannot exceed the consideration received by the covenantor for the same lands: *Id.*

In an action of covenant of title by the assignee of the covenantee, counsel fees paid by him in defending the ejectment suit cannot be recovered as part of the damages, he having voluntarily undertaken to defend his title instead of giving notice to the covenantor or those bound by the covenant to do so: *Id.*

Where notice is given to the covenantor or those bound by the covenant, and they refuse to defend the title, the covenantee or his assignee has the right to employ counsel for that purpose, and may recover in an action on the covenant such reasonable fees as he has been compelled to pay: *Id.*

Where an action is brought on a covenant of warranty against the heirs of the covenantor, they are jointly liable, and the verdict should be against them *in solido: Id.*

In actions on covenants of warranty, limitations do not begin to run until there is a breach of the covenant: *Id.*

A covenantee or his assignee who has suffered eviction, is not bound to seek satisfaction of his claim out of the personal estate of the covenantor before recovery can be had against his heirs: *Id.*

In an action on warranty of title against the heirs of the covenantor, by the assignee of the covenantee, the record of the ejectment suit is admissible as evidence against the defendants, to prove the fact of the judgment of eviction, although they had received no notice of the pendency of the suit in ejectment: *Id.*

DAMAGES. See *Covenant—Mortgage.*

DOG.

Liability of Owners for Damages by.—Under General Statutes, ch. 105, § 8, the owner or keeper of a dog is liable to the person injured by

it, for double the damages sustained, whether such owner or keeper had notice of the vicious habits of the animal or not: *Orne* v. *Roberts*, 51 N. H.

The double damages under this statute may be recovered in an action of debt, without previously determining the actual damages in an action on the case: *Id.*

ELECTION. See *Constitutional Law.*

EQUITY.

Multifarious Bill—Contract to sell—Statute of Frauds.—A bill by a husband and wife praying performance of one or the other of two agreements, the one a parol agreement made with the husband, and the other a written agreement made with the wife, both for the conveyance by the defendant of the same premises upon the same terms, is not multifarious: *Green and Wife* v. *Richards*, 8 C. E. Green.

Such bill might have been demurrable for a misjoinder. But here the error is not such that the court will refuse relief on this technical objection, after the defendant has allowed the cause to proceed to hearing: *Id.*

Taking possession of the premises under a parol agreement for their conveyance, is such part performance as will take the case out of the Statute of Frauds and support the suit on the agreement; part payment will not: *Id.*

A memorandum endorsed on a receipt, &c., as follows: "This is to show that I agree to sell to Mrs. G., house and lot No. 71, Ferry Street, for the sum of $2500, and that when there is $500 paid and the back rent, I will give her the deed and take a mortgage for $2000," signed T. E. R., is a contract certain and definite, except as to whether the mortgage should draw interest or not, but there being no agreement for time, and the purchaser not being entitled to any credit, a court of equity will presume it to have been the intention of the parties that the mortgage should be made payable on demand, and enforce the contract: *Id.*

Jurisdiction.—The appearance of a defendant to a bill in equity, confers jurisdiction, unless it be for the sole purpose of setting up the want of jurisdiction: *Merrill* v. *Haughton, et al.*, 51 N. H.

Therefore, if the party appear and make this objection, and at the same time demur to the bill for want of equity, the defect of jurisdiction is cured: *Id.*

A bill in equity brought to redeem stocks pledged to the defendants, may be sustained, although they may have sold the stocks; and in case it be out of their power to return the stocks, the court may in a proper case decree compensation: *Id.*

ESTOPPEL. See *Grant—Insurance.*

Standing by and allowing Party to expend Money under belief he was Owner.—When a party purchases land at its full fair value, and supposing it to be free from encumbrance, erects buildings of considerable value, and judgment-creditors of the former owner of the land with knowledge that the buildings were being erected, and having reason to

believe that it was done under a mistake, by their silence and acquiescence, fraudulently encourage him to go on and erect his buildings, and then issue an execution, the sale of the buildings will be restrained: *Dellette* v. *Kemble and Others*, 8 C. E. Green.

Fee Simple.

Creation of an Estate in Fee—Nature of the Estate conveyed, determined by the Object to be effected—Declaration of Trust.—Words of limitation or inheritance are not essential to create an estate in fee, nor is the nature of the estate conveyed, whether a trust, or use executed, determined so much by the terms used, as by the object to be effected: *Hawkins* v. *Chapman*, 36 Md.

A deed, after reciting certain judgments, and the fact that they had been superseded by A. and B., and that C. was desirous of securing them against any damage or injury which might arise in consequence of having become his security, conveyed unto D. "all the right, title and interest of C. and wife" in the land described, "in trust for the use and behoof of the said A. and B.;" with the proviso that if the said C. should save A. and B. from all damage or injury which might result from having superseded said judgments, then the deed was to be void, otherwise to remain in full force and virtue in law. *Held*, that by virtue of the intention of the grantors and the ends to be accomplished, the deed conveyed to the grantee the legal estate in fee in the lands therein described, with power to sell and convey for the benefit of the *cestuis que trust* on condition; which being a naked trust, unaccompanied with a beneficial interest, descended on the death of the grantee to his heir at common law, as provided by the Act of 1831, ch. 311, § 11: *Id.*

Frauds, Statute of.

Bids for several Articles at an Auction Sale one Contract—Vendor's Lien.—Plaintiff sold the furniture in his hotel and his stable stock at the same auction and upon the same terms and conditions, and defendant purchased a large number of separate articles upon as many separate bids and at separate and distinct prices, many of which were less than $33. This was regarded as an entire contract for the whole of the property thus purchased by the defendant at the aggregate price, and will thus be within the Statute of Frauds, if the aggregate price exceeds $33: *Jenness et al.* v. *Wendell*, 51 N. H.

In such case a delivery and acceptance of a part of the goods, will take the entire contract out from the operation of the Statute of Frauds: *Id.*

And it would make no difference whether the sale was completed in one day or extended through two or more days: *Id.*

Where the terms of the sale are "cash on delivery," the vendor may hold a lien upon the property until the price is paid if he chooses, or he may waive the payment and his lien, in which case the title to the property will vest in the purchaser from the time of the sale: *Id.*

A declaration for goods sold and delivered may be amended by adding a count for the same goods bargained and sold, without changing the form or the cause of action.

Grant.

Where a grantor with warranty has no title to the premises conveyed

at the date of the conveyance, if he subsequently acquires an estate therein, such acquired estate will enure to the benefit of the grantee; if not by estoppel, it will upon the principle of avoiding circuity of action: *Tefft* v. *Munson et al.*, 63 Barb.

A mere grant operates upon the possession; it simply conveys the estate and interest which the grantor had in the premises granted. If the grantor had no estate, there is no estate to be accepted; so that on the conveyance by grant only of lands, by deed or mortgage, the grantee is not estopped from averring that his grantor had nothing in the lands granted: *Id.*

But where the conveyance is by warranty the rule is different. In that case the warranty will rebut and bar the grantor and his heirs of a future right; not because a title ever passes by such a grant, but the principle of avoiding circuity of action interposes and prevents the grantor from impeaching a title, to the soundness of which he must answer on his warranty: *Id.*

Highway.

Invalid laying-out.—Where the petition for a highway made a stake and stones in an existing highway one of the *termini*, and the road laid out struck this highway more than one hundred rods northerly of that *terminus*, and then over that highway to that bound, it was held that this was such a departure from the highway prayed for, as to render the laying-out invalid: *Flanders* v. *Colebrook*, 51 N. H.

Husband and Wife.

Liability of Wife upon Notes.—The obligation of a married woman, except in the cases where her separate property is involved, is void: *Hansel* v. *De Witt*, 63 Barb.

A married woman is not liable upon a promissory note signed by her as surety for another, or upon one given in renewal thereof, although she has a separate estate; where there is nothing to show a charge, or an intent to charge such estate, or that her estate was benefited, and no evidence (except by implication) to show that the note was given upon the credit of such estate: *Id.*

When a Husband may sue in his own Name, to enforce a Contract relating to his Wife's Property.—Where a married man under a contract to pay him individually, one-half of the expense, erects a divisional fence between the lands of his wife and those of an adjoining proprietor, he is entitled to sue in his own name to recover the amount, notwithstanding he may have acted as the agent of his wife in having the fence erected: *Wilson* v. *Sands*, 36 Md.

Insurance.

Fire Insurance—Implied Waiver—Estoppel—Construction of Clauses in a Policy of Insurance against Fire—Builder's Risk—Evidence of insurable Interest.—Where the preliminary proofs of the loss by fire of property insured are furnished to the insurance company within a reasonable time, and no objection is then made to such proofs or to the absence of a certificate required of the insured by a condition of the policy, and the insurance company months afterwards refuses to pay the

loss under the policy upon other and distinct grounds, and at the time of such refusal makes no objection to the proofs of loss, or to the absence of the certificate, it will be estopped in an action on the policy, to set up and rely upon such objections, notwithstanding the policy provides that "nothing but a distinct specific agreement, clearly expressed and endorsed on the policy, shall operate as a waiver of any printed or written condition, warranty or restriction therein:" *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Md.

A clause in a policy of insurance against fire, that "nothing but a distinct specific agreement, clearly expressed and endorsed on the policy, shall operate as a waiver of any printed or written condition, warranty or restriction therein," refers to those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated as *conditions;* it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs of the loss: *Id.*

Where from the character and structure of a building insured, and the use made of it, it is necessary to employ workmen the year round to repair, and keep it in thorough condition for the business to which it is appropriated, such employment of workmen thereon does not vitiate the policy under the memorandum printed thereon, entitled "Builder's Risk," which provides that "the working of carpenters, roofers, tinsmiths, gas-fitters, plumbers or other mechanics in building, altering or repairing the premises named in this policy, will vitiate the same, unless permission for such work be endorsed in writing hereon:" *Id.*

The true intention of this article in the policy is to prohibit such hazardous use of the building insured, as is generally denominated "*builder's risk*," which arises from placing it in the possession, or under the control of workmen for rebuilding, alteration or repairs; it does not refer to such repairs as are indispensable to the proper conduct of the business to which the building is appropriated: *Id.*

A person in possession of property, claiming and occupying it as its owner, is *primâ facie* presumed to be seised in fee; and in absence of any proof of an outstanding title in others, or of any encumbrance upon the property, this *primâ facie* presumption is sufficient to show an insurable interest therein: *Id.*

INTERNATIONAL LAW. See *Judgment.*

JUDGMENT.

Action on Judgment—Judgment is Contract.—An action can be maintained on a domestic judgment in this state: *Burns et al.* v. *Simpson et al.*, 10 Kans.

In an action on a domestic judgment it is not necessary to aver personal service: *Id.*

When the action is founded on a judgment a copy of the judgment sued on should be filed with the petition, but the neglect so to do should be taken advantage of by motion, and cannot be reached by demurrer: *Id.*

Strictly speaking, a judgment is a contract, and of that class of contracts called specialties but the word contract is not ordinarily used in

a sense that includes judgments; nor is it generally so used by law writers; nor is it so used in section twenty of the code of civil procedure of 1859: *Id.*

The sixth sub-division of section eighteenth of the code of 1868, will not be given a construction that will absolutely cut off all rights of action, when the same had not been barred by previous statutes: *Id.*

Vacation of void Judgment—Judgment against Person inside Confederate Lines.—A void judgment may be vacated and set aside at any time, on motion of the defendant, and this though the judgment had been rendered more than three years before the code of 1868 took effect: *Forman* v. *Scott*, 10 Kans.

Where one, after the commencement of the late war, voluntarily left his place of residence within the Union lines, and entered the Confederate lines, and joined the Confederate army, he cannot avoid proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings were had: *Id.*

Landlord and Tenant.

When Equity will not Intervene between Landlord and Tenant.—Where the relation of landlord and tenant exists, and through failure of the landlord to take the necessary steps, as provided by law, to terminate the tenancy at its expiration and summarily eject the tenant holding over, the tenant has acquired the right to continue the tenancy at sufferance, or for another year, a court of equity will not intervene and oust him because he is a bad manager, or is vicious and disagreeable to his landlord, or is insolvent: *Blain* v. *Everitt*, 36 Md.

Merger.

Purchase of Equity of Redemption by Mortgagee.—Stated generally, the law is that when the mortgagee purchases the equity of redemption of the mortgagor, his mortgage interest is extinguished. But this general doctrine is subject to qualifications. Merger is not favored in equity, and is never allowed unless for special reasons and to promote the intention of the party: *Clos and others* v. *Boppe*, 8 C. E. Green.

When the equities are subserved by keeping the mortgage alive, and no injury or injustice is thereby wrought, it is not extinguished: *Id.*

When the mortgaged premises were afterward conveyed to a mortgagee, though not purchased by him, and he did not derive, or expect to derive, any benefit from the conveyance, and it was not his intention to have his mortgage extinguished, he is entitled to recover the amount due thereon: *Id.*

Mortgage.

As Collateral Security for Notes.—A mortgagee holding two notes, secured by one mortgage, can transfer one note and the mortgage, so as to give that note priority in satisfaction out of the mortgaged property: *Noyes* v. *White et al.*, 10 Kans.

An endorsement of the one note, with an assignment of "all the right, title and interest of the mortgagee in the mortgage" will be sufficient in the absence of all circumstances indicating a contrary intention, to give to the holder of such note priority: *Id.*

Before protest-damages can be recovered, there must be such demand and notice as will charge the endorser: *Id.*

Right of Assignee—Pledge of Mortgage as Collateral Security for a Note—Subrogation.—An assignee takes a mortgage subject to all the equities to which it was liable in the hands of his assignor. And where the mortgage has been pledged as security for the payment of a note, he is entitled in a suit for foreclosure, only to a decree for the balance due on the mortgage after deducting the amount of the note: *Kamend* v. *Huelbig and others*, 8 C. E. Green.

Where the mortgagor has paid the note, and the note and mortgage have been delivered to him, he is subrogated in the place of the payee of the note as her assignee, and will be allowed the amount as a credit on the mortgage: *Id.*

A deduction allowed by the payee from the amount really due on the note does not enure to the benefit of the complainant. A receipt being taken in full of the payee's claim on the bond and mortgage, the mortgagor is entitled to a credit on the mortgage for the full amount of the note: *Id.*

The bond and mortgage were lawfully pledged by the note. It does not require a written instrument to assign a bond even at law. In this case a mere delivery of the bond and mortgage would have been sufficient: *Id.*

This assignment does not come within the provisions of the second section of the Act March 14th 1863 (Nix. Dig. 613), requiring it to be in writing. But if it did, the written pledge in this case is sufficient. *Id.*

That the matter of the note pledging the mortgage as security for the payment, was a married woman, does not affect the validity of the assignment. Her husband was present when she gave it and approved it: *Id.*

That the complainant did not know of this assignment does not effect it: *It.*

That the mortgagee did not have the bond and mortgage in his hands for delivery at the time she assigned them, was notice to the assignee that they were held by some one as owner or claimant. But he was entitled to no notice; he took them subject to all equities in this respect: *Id.*

Attachment Bond—Act of 1864, *ch.* 306—*Impeachment of Mortgage —Evidence in mitigation of Damages in an Action for the Illegal Seizure of Mortgaged Goods—Exemplary Damages—Measure of Damages.*—The bond required by the Act of 1864, ch. 306, as preliminary to issuing an attachment, if not executed in conformity with the statute, is invalid, and the attachment is illegal and void: *Wanamaker* v. *Bowes*, 36 Md.

A creditor of a mortgagor not having acquired a lien upon the mortgaged goods, by attachment or other valid legal process, will not, in an action against him by the mortgagee for wrongfully and illegally seizing the mortgaged property, be permitted merely because he is a creditor of the mortgagor, to impeach the mortgage as fraudulent as against creditors, either as a defence to the action, or in mitigation of damages: *Id.*

In an action by a mortgagee against a creditor of the mortgagor for a wrongful and illegal seizure of the mortgaged goods—they having been

taken under a void attachment—the defendant may prove in mitigation of damages, that at the time of the seizure under the attachment, there was rent in arrear due upon the premises occupied by the mortgagor, in which the goods were; that after the seizure by the sheriff, and before the removal of the goods, there were filed with him by the landlord a notice and affidavit of such rent in arrear, and that in pursuance of such notice, and of an order of court passed in the attachment case, the sheriff paid to the landlord, out of the proceeds of the sales of the property, the amount of the rent in arrear: *Id.*

In an action for an illegal seizure of goods, where there is no evidence of wanton or malicious wrong on the part of the defendant, exemplary damages should not be allowed: *Id.*

The measure of damages, for an illegal seizure of goods, is to be determined in accordance with the facts of the particular case: *Id.*

NUISANCE.

Injunction—Fact of other similar Nuisances existing in same Locality.—It is not necessary for the purpose of an injunction that the odors or gases arising in the carrying on of the defendants' business should be noxious or unwholesome; it is sufficient if they be so offensive or disagreeable as to render life uncomfortable: *Meigs* v. *Leister*, 8 C. E. Green.

A mistake in the name of the location of the defendants' works, whence the nuisance arises, cannot affect the question: *Id.*

That the nuisance is not constant does not affect the right of the complainants to protection: *Id.*

The complainants' right to relief from the nuisance of the defendants' works is not affected by the allegation (were it true), that the locality is surrounded by other nuisances, and dedicated to such purposes: *Id.*

If there are several nuisances of the like nature surrounding the complainants, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*: *Id.*

That the city of New York should have some place where it can deposit and utilize its filth, and that it has selected the place in this state, where the defendants' works are carried on, will not compel the complainants to submit to the injury as *damnum absque injuria*. What place such filth could be taken to, where it would be less injurious than the place so selected, is not a question for the consideration of this court: *Id.*

When the fact of the nuisance is free from doubt, a delay of several months will not prevent relief by preliminary injunction: *Id.*

OFFICER. See *Constitutional Law.*

Special Appointments of Commissioners for a single Case—How far public Officers.—Persons specially appointed by the court to act upon a single petition for a highway, are county commissioners, so far as that case is concerned, and are public officers, who are required by the Constitution to take and subscribe the oath of allegiance and the oath of office, before entering upon the discharge of their duties: *Wentworth et al.* v. *Farmington et al.*, 51 N. H.

When commissioners were thus specially appointed to act on a single petition, and were sworn only to the faithful performance of their duty,

and a certificate of such oath was returned to the office of the clerk of the court, as required by statute, before they entered upon the discharge of their duties: *Held*, that this was constructive notice to all parties of all facts contained in said certificate, and that any party who would object to the qualifications of the commissioners, must do so before the hearing, or his objection will be held to be waived: *Id.*

When the commissioners make a report to this court upon such petition, and objection is made to its acceptance, on the ground that the commissioners were not duly qualified; the court will consider the objection, and if they find it well founded, will set aside or recommit the report, provided there is any party in court, in a position to raise the objection. It is not enough in such case to say that they were commissioners *de facto*. The case might be different if their report had been accepted, and some question of their qualification afterwards arose between other parties: *Id.*

Partnership.

Land bought with Partnership Funds—Bill in Equity for Account.—Land bought with partnership funds, although the title be taken in the name of one of the partners, will be treated in equity as partnership property: *Deveney* v. *Mahoney*, 8 C. E. Green.

The same principle applies to improvements made with partnership funds, on the separate property of one of the partners: *Id.*

It would seem that it is not necessary that judgment should be first obtained against the copartner in whose name the title is vested, to enable a partner to maintain a suit in equity for an account, and to have the property declared partnership assets: *Id.*

The rule that a fraudulent or voluntary transfer of property cannot be contested by a creditor at large, but only by one who has obtained a judgment that would be a lien upon the property if not transferred, is well established, but does not apply to one partner calling on another to account: *Id.*

Where a part of the purchase-money of the property alleged to have been fraudulently conveyed by a partner, remains unpaid at the time of filing a bill for account against him, the grantee, as to that amount, is not a purchaser for value, without notice, and the property is liable to that amount, provided so much of the partnership funds have been expended thereon: *Id.*

Railroad.

Action for Negligence—Damages—Evidence.—In an action by an individual against a railway company, for injuries claimed to have been caused through the negligence of the servants of the railway company, in running a train over the plaintiff while he was walking on the track of the railway company, which track the plaintiff claimed was located on a public street in the city of Leavenworth, it is competent for the plaintiff, with proper allegations in his petition, to show that the place where the accident occurred was on a public street, either *in law or in fact;* and if he shows either, he will not be a trespasser upon the rights of the railway company, so as to relieve the railway company from exercising reasonable and ordinary care and diligence, so as to avoid injuring him. In such a case the railway company must run their trains with reference to him and to all others who may rightfully be upon the street: *K. P. R. W. Co.* v. *Pointer*, 10 Kans.

The plaintiff may also show in such a case (with proper allegations in his petition), the nature and extent of his injuries, his sufferings, the length of time he was disabled, the value of his time, his expenses in being cured, his condition with respect to the injuries at the time of the trial, his prospective condition, or rather the effect the injuries will in all probability have upon him in the future; and this prospective effect may be proved by the professional opinion of the physician and surgeon who attended him, or by any other competent physician and surgeon who has made a sufficient examination of the injuries: *Id.*

It was not competent in such a case, for the purpose of showing the injuries, or their character or extent, or for the purpose of enhancing the damages which the plaintiff expected to recover, for the plaintiff to prove his pecuniary or social condition, whether he was rich or poor, married or single, or whether he had a family or not: *Id.*

Hearsay testimony is incompetent, and for the court to admit hearsay testimony, which tends to prove that the servants of the railway company were negligent in running their train, whereby the injuries complained of were caused, is a material error, for which the judgment of the court below against the railway company, founded in part on such testimony, must be reversed: *Id.*

RESIDENT. See *Statutes.*

SALE. See *Frauds, Statute of.*

STATUTES. See *Constitutional Law.*

Rules of Construction.—A leading and controlling rule in the construction of statutes, is to interpret them according to the true meaning and intent. To ascertain this intent, it is the duty of the court to find, by established rules, what was the fair, natural and probable intent of the legislature: *The People et al.* v. *Schoonmaker et al.*, 63 Barb.

For this purpose the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere: *Id.*

But where the meaning of words is doubtful, and where it is seen that the same words have different meanings when employed under different circumstances, or to effect different objects, resort may be had to extrinsic circumstances, and the courts may seek for that intent in every legitimate way: *Id.*

Corporations—Residents.—Independent of the cases making them "inhabitants" and "residents," by construction, for certain purposes, the natural, ordinary and literal construction of the words "residents of a town," would not include corporations, especially those whose places of business were elsewhere: *Id.*

The word "residents" occurring in the Constitution or in a statute, ordinarily means an individual—a citizen—and does not mean a corporation: *Id.*

SUBROGATION. See *Mortgage.*